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5 Attorneys for Plaintiff  
6 FIREMAN'S FUND INSURANCE COMPANY,  
a foreign corporation a/s/o BASIC RESOURCES, INC.  
and GEORGE REED, INC., a foreign corporation

7 **IN THE UNITED STATES DISTRICT COURT**

8 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

10 FIREMAN'S FUND INSURANCE ) CASE NO. C 07 06302 CRB  
11 COMPANY, a foreign corporation )  
a/s/o BASIC RESOURCES, INC. )  
12 and GEORGE REED, INC., a foreign )  
corporation, )  
13 Plaintiff, )  
14 vs. )  
15 GERLING AMERICA INSURANCE )  
COMPANY, a foreign corporation, )  
16 )  
17 Defendant. )  
18 )

19  
20 **COMES NOW**, Plaintiff, FIREMAN'S FUND INSURANCE COMPANY a/s/o BASIC  
21 RESOURCES, INC. and GEORGE REED, INC., ("FFIC") by and through undersigned counsel and  
22 pursuant to the Court's March 28, 2008, Order directing preparation of this Brief, respectfully  
23 files/serves this Brief asserts that Florida law applies in resolving this lawsuit.

24 **BACKGROUND**

25 1. This case was removed to this Court from its original filing in the United States  
26 District Court, Southern District of Florida, Miami Division, Case No.: 07-21162-Lenard.  
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1       2.     Defendant, GERLING AMERICAN INSURANCE COMPANY ("GERLING"),  
2 transferred this case to this forum, pursuant to 28 U.S.C.S. § 1404(a), based upon a Forum Non  
3 Conveniens argument.

4       3.     Plaintiff brings this action seeking declaratory relief and damages for GERLING's  
5 refusal to pay insurance benefits to Plaintiff, a Judgment Creditor of GERLING's insured, Gencor  
6 Industries, Inc., pursuant to GERLING's Policy No.: 4003527GLP. Said Policy is a standard  
7 commercial general liability policy with Florida endorsements, which FFIC submits was issued to  
8 and delivered to Gencor at its principal place of business in Orlando, Florida. Gencor is not,  
9 however, incorporated in Florida or in California but is headquartered at 5201 N. Orange Blossom  
10 Trail, Orlando, Florida 32810. Gencor designs and manufactures facilities for producing highway  
11 construction materials, including hot asphalt plants. The underlying case arose out of the purchase  
12 of parts used to construct a plant by FFIC's Insureds (Basic Resources and George Reed) who are  
13 California highway construction contractors. The assembled Asphalt plant makes hot asphalt. The  
14 FFIC Insureds entered into a contract for the purchase of parts for the unassembled Plant which  
15 Gencor sold and shipped to California. FFIC's Insureds then built the Asphalt Plant. Pursuant to the  
16 purchase contract, Gencor sent its technician, Calvin Dixon, from Orlando, Florida to the California  
17 site in order to assist in the Calibration of the computer-operated Asphalt Plant. Mr. Dixon  
18 accidentally blew up the Asphalt Plant owned and constructed by FFIC's Insureds, causing property  
19 and business loss damages. FFIC investigated the claim of its insureds, determined it was "covered"  
20 under their policy, paid them and thereby became subrogated to its insured's' claims against  
21 Gencor. Ultimately, FFIC sued Gencor in Florida State Court in the Circuit Court of the 9<sup>th</sup> Judicial  
22 Circuit in and for Orange County, Florida, pursuant to a "venue selection" provision in the purchase  
23 contract. FFIC recovered the Final Judgment in its favor on the liability/damages issues and a  
24 separate Final Judgment awarding FFIC attorney's fees and costs, pursuant to Florida's Proposal for  
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1 Settlement procedure set forth in Fla.R.Civ.P. 1.442 and § 768.79, Fla. Stats. GERLING defended  
2 Gencor, under a reservation of rights and at all times material, Genor was discharged in bankruptcy  
3 resulting in FFIC's agreement to limit its claims to available insurance coverage. GERLING has  
4 refused to satisfy the Judgment in accordance with the terms of its policy. Accordingly, FFIC seeks  
5 payment as a Judgment holder against GERLING's insured.  
6

7 **MEMORANDUM OF LAW**

8 4. In Van Dusen v. Barrack, 376 U.S. 612, 84 S.Ct. 805, 116 Ed.2d 945, (1964), the  
9 United States Supreme Court held that "following a transfer under § 1404(a), initiated by a  
10 defendant, the transferee Court must follow the choice-of-law rules that prevailed in the transferor  
11 Court." The Van Dusen policy and has since been held applicable regardless of which party  
12 initiates a transfer for the convenience of the parties under 28 U.S.C.S. § 1404(a). See: Ferens v.  
13 John Deere Co., 494 U.S. 516, 110 S.Ct. 1274; 108 L.Ed 2d 443 (1990).

14 5. As the State of the transferor Court, Florida law applies. Florida is also the state  
15 where the GERLING insurance policy was delivered and issued. When resolving choice of law  
16 issues in contract actions, the Florida Supreme Court unambiguously has indicated its intent to  
17 adhere to the traditional rule of *lex loci contractus*. Sturiano v. Brooks, 523 So.2d 1126 (Fla. 1988);  
18 Goodman v. Olsen, 305 So.2d 753 (Fla. 1974); Pastor v. The Union Central Life Ins. Co., 184  
19 F.Supp. 2d 1301 (M.D. Fla. 2002); See also: Bloch v. Berkshire Ins. Co., 585 So.2d 1137 (Fla. 3d  
20 DCA 1991); La Torre v. Conn. Mut. Life Ins. Co., 38 F.3d 538 (11<sup>th</sup> Cir. 1994) ("Florida adheres to  
21 the traditional rule that the legal effects of terms of the insurance policy and rights and obligations  
22 of persons insured thereunder are to be determined by the law of the state where the policy was  
23 issued").  
24

25 **CONCLUSION**  
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1       6.     Clearly, Florida law applies in construing application of the GERLING insurance  
2 policy. Florida is the state of the transferor court and so, Florida choice of law rules apply. With  
3 respect to determining rights and obligations under a policy of insurance, Florida choice of law  
4 rules apply the doctrine of *lex loci contractus* and such is determined by where the policy was  
5 delivered/issued. The policy was delivered and issued to Gencor in Florida. Notwithstanding the  
6 foregoing, because the GERLING policy is a Standard Comprehensive Liability Form, case law  
7 from other jurisdictions, including California, should be considered persuasive though not binding  
8 on this Court.

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10     **WHEREFORE**, Plaintiff, FIREMAN'S FUND INSURANCE COMPANY a/s/o BASIC  
11 RESOURCES, INC. and GEORGE REED, INC., by and through undersigned counsel, respectfully  
12 request that this Court apply Florida law in determining the parties' rights and obligations under the  
13 policy, including the "Supplemental Payments Provision."

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15 By:     /s/ Jon D. Derrevere  
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33  
34      Co-counsel for Plaintiff

## PROOF OF SERVICE

*Fireman's Fund Ins. Co. v. Gerling American Ins.*

United States District Court, Northern District of California

Case No.: C 07 06302 CRB

I am employed in the City and County of West Palm Beach, State of Florida. I am over the age of 18 and not a party to the within action; my business address is: Derrevere, Hawkes & Black, 470 Columbia Drive, Building "B", West Palm Beach, Florida 33409.

On April 1st, 2008, I served the foregoing document(s) described as:

**PLAINTIFF'S BRIEF, PURSUANT TO ORDER DATED MARCH 28, 2008, WHICH  
ADDRESSES APPLICABLE LAW IN THIS DIVERSITY JURISDICTION MATTER  
TRANSFERRED PURSUANT TO 28 U.S.C.S. § 1404 (a)**

12 On the interested parties in this action by placing [ ] the original [ ] a true copy thereof enclosed in a sealed envelope addressed as stated below:

[ ] BY REGULAR MAIL:

14 I caused such envelopes to be deposited in the United States Mail at West Palm Beach,  
15 Florida with postage thereon fully prepaid. I am "readily familiar" with the firm's practice of  
16 collection and processing correspondence for mailing. It is deposited with United States postal  
service each day and that practice was followed in the ordinary course of business for the service  
herein attested to.

[X] BY ECF:

I HEREBY CERTIFY that on this 1st day of Apr 1, 2008, I electronically filed the foregoing document with the Clerk of Court using CM/ECF. I also certify that the foregoing document is being served this day on: TINO X. DO, Barger & Wolen, LLP, 650 California Street, 9<sup>th</sup> Floor, San Francisco, CA 94108, tdo@barwol.com and CHARLES K. BRUNN, Brunn & Flynn, 928 12<sup>th</sup> Street, Suite 200, P.O. Box 3366, Modesto, CA 95354, CBrunn@Brunn-Flynn.com via transmission of Notices of Electronic Filing generated by CM/ECF.

22 **[X] FEDERAL** - I declare that I am employed in the office of a member of the Florida Bar,  
23 admitted to practice in all Florida Courts and who makes this Pro Hac Vice Application, that our  
24 co-counsel and sponsor is a member of the bar of this California Court, and at their direction this  
service was made. Executed at West Palm Beach, Florida on October 1<sup>st</sup>, 2008.

NAME: Deanna N. Menendez

Signature: Alanna M. Henderson